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In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA,

Respondent,

vs.

CHARLES G. NICKELS

Petitioner.

REPLY TO MEMORANDUM FOR THE UNITED STATES

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Petitioner Charles G. Nickels herein replies to the Memorandum for the United States, which was submitted in answer to his Petition for Certiorari to the United States Court of Appeals for the Seventh Federal Circuit.

REASONS FOR GRANTING THE WRIT

1. Was The Denial Of The Opportunity To Present To The Jury The Circumstances Surrounding Petitioner's Grand Jury Testimony, Offered To Negate The Requisite Specific Intent And To Establish A Defense Of Duress, Improper?

(In Reply to Government's Memorandum, Pages 3-4)

Petitioner has contended throughout that he had a right to present to the petit jury the coercive circumstances surrounding his appearance and testimony before the grand jury, in order to negate the specific intent element of the crime charged and to establish an affirmative defense of duress. The Government has failed to respond to petitioner's contention that he was denied his right to submit evidence regarding the specific intent element of the offense. The Government's reliance upon the traditional rule that an affirmative defense exists only as to a defendant's reasonable fear of "immediate death or serious bodily injury", moreover, clearly ignores the recent judicial expansion of the traditional rule in specific intent cases to include evidence of a defendant's reasonable fear of immediate peril other than death or serious bodily injury.

In affirming the trial court's refusal to admit the evidence offered in negation of the specific intent element, the decision below is clearly in conflict with the decision in *United States* v. *Barash*, 365 F.2d 395, 412 F.2d 26 (2d Cir. 1969), *cert. denied*, 306 U.S. 832 (1969). *And see United States* v. *Ramzy*, 446 F.2d 1184 (5th Cir. 1971), *cert. denied*, 404 U.S. 992 (1971). Without commenting on *Ramzy*, the Government attempts to distinguish *Barash*

by asserting that "Petitioner [does not] contest the finding of his intent to make false declarations before the grand jury." (Memorandum, Ft. 4, Page 5). This is obscurantism, as petitioner was denied the *right* to effectively contest such a finding by the district court's refusal to allow the jury to consider the proffered evidence.

Despite the Government's attempt to distinguish the decisions cited by petitioner [1] in support of his contention that the evidence in question should also have been admitted in support of a duress defense, it seems beyond cavil that the Courts in those cases took into consideration evidence of immediate peril other than death or serious bodily injury. Admission of such evidence is clearly in accord with this Court's decision on the duress issue in *United States* v. *Knox,* 396 U.S. 77, 81-84 (1969), where the alleged duress resulted from a federal tax law obligation to provide information which would have been incriminating under state wagering laws.[2] To the same end is the Fifth Circuit's remand for a hearing on the duress issue in *United States* v. *Willoz,* 449 F.2d 1321 (5th Cir. 1971), where the alleged duress arose from circumstances surrounding the Government's obtainment of affidavits from the defendant, which did not rise to the level of fear of death or bodily injury. The decision below is in direct conflict with the Courts' reasoning in the above cases, since the "death/serious injury" element was obviously

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[1] Petition for Certiorari at Pages 5, 8; Memorandum at Ft. 4, Pages 4-5.

[2] In *Knox,* this Court stated (396 U.S. at 81):

> In choosing the third alternative, submission of a fraudulent form, [Knox] merely opted for the least of three evils, under a form of duress that allegedly makes his choice involuntary for purposes of the Fifth Amendment.

not present in either case prior to the remand of each on the issue of duress.[3] Even if those cases do not constitute a formal expansion of the traditional rule, petitioner respectfully suggests that the conflict is no less real, and that the facts underlying the present case merit review of the rule by this Court.

2. May The Government, Through Acts Of Omission And Affirmative Misstatements, Attempt To Procure False Statements Under Oath?

(In Reply to Government's Memorandum, Pages 5-9)

While compelled to concede that the government's "warning" to petitioner was substantively untrue in view of this Court's then-five year old decision in *Garrity* v. *New Jersey,* 385 U.S. 493 (1967), the Government asserts that "[t]he incorrect warning simply stated one horn of a dilemma that Rule 51 would have created if valid." (Memorandum, Page 5). This response lacks any rational meaning: the incorrect "warning" did not state, but rather *created* for the witness an unconstitutional dilemma which the Government knew to be contrary to this Court's prior decision in *Garrity.* The Government's suggested means for petitioner's avoidance of the dilemma which the incorrect "warning" created (that he tell the truth and subsequently move to suppress under *Garrity,* or that he invoke a Fifth Amendment privilege and challenge the subsequent Rule 51 administrative proceeding) assumes that the petitioner either knew the law under *Garrity,* (he

[3] In his opinion for the Court in *Knox,* Mr. Justice Harlan suggests that the duress issue is "one that must be determined initially at trial," and not by way of a motion to dismiss the indictment. 396 U.S. at 83; *Id.* at 83, footnote 7.

did not, and had no attorney) and that he disbelieved the incorrect "warning", or assumes that petitioner was omniscient as to what the law would subsequently become.[4]

More importantly, the Government's suggested means for petitioner's avoidance of the dilemma completely ignores the Government's role in creating the dilemma. We are cognizant of the traditional view that perjurious testimony constitutes an offense against the judicial system itself and, as the Government has repeatedly stated, that the grand jury system imposes upon a witness a duty to provide truthful testimony. To the same end, it should be apparent that the Government, as the representative of the Court in grand jury proceedings, plays a critical role in preserving the integrity of that system. In this capacity, the Government must have some minimum duty to a witness in grand jury proceedings. The Government's petitions for certiorari in *Mandujano* and *Wong*,[5] cited in the instant Memorandum at Pages 6 (Ft. 5), 8, 9, acknowledge the need for this Court to review and clarify the precise nature of the Government's duty to grand jury witnesses, and specifically to those witnesses who are

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[4]At the time of petitioner's grand jury testimony, Rule 51 was in full effect. Under a later challenge, Rule 51 was declared constitutionally invalid to the extent that it denied police officers Fifth Amendment access. *Confederation of Police* v. *Conlisk*, 489 F.2d 891 (7th Cir. 1973), *cert. denied*, 416 U.S. 956 (1974). It is clear on the record that petitioner detrimentally relied upon the incorrect "warning" as well as upon his knowledge of the summary use being made of Rule 51 at the time. *See*, Transcript of Hearing on Defendant's Pre-trial Motion, January 11, 1974 (hereinafter "1/11 Tr.") at pages 62-64, 67-68.

[5] *United States* v. *Mandujano*, No. 75-754; *United States* v. *Wong*, No. 74-635.

"putative defendants".[6] The issue raised here goes beyond any duty to give *Miranda*-type warnings, and focuses instead on the Government's more fundamental duty to preserve the integrity of the grand jury process. The question here is what deprivations, if any, must the system (and the petitioner) endure where the integrity of that system would have been preserved *but for* the Government's conduct. Hence regardless of any duty which the Government may or may not have with respect to the language and syntax of warnings given to putative defendants, the fundamental issue here remains: where, as here, the Government *chooses* to give warnings, even if under no duty to do so, may the Government disavow any obligation to be truthful. The Government's attempt to characterize their representations to petitioner as "over-

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[6] Remarkably, the Government would now seek to deny that petitioner was in fact "a putative defendant". It is worthy of note that petitioner has always contended that he was a "putative defendant" in an improper sense, that is, that he was called before the grand jury for the purpose of eliciting testimony which would provide a basis for a perjury indictment. A part of the Government's response to this contention has always been that petitioner was called in good faith before the grand jury as a "putative defendant" under a lingering conspiracy theory. Thus the Government has pointed to previous information, including witness statements, in which every member of the 18th Chicago Police District was accused of participation in some way in the activities under investigation; in those, petitioner had been specifically identified. *See, e.g.*, Defendant's Exhibit 1, 2. Similarly, at the hearing on petitioner's motion to suppress his grand jury testimony, the Government presented evidence to show that it had in fact been considering petitioner for a conspiracy indictment even though the petitioner had had no contact with the 18th Police District for more than five years. 1/11 Tr. at 29-31; 46; 50-53. At no time prior to the instant Memorandum has the Government ever contested petitioner's "putative defendant" status (*Cf.*, Appellees Br. at 12; Appellant's Br. at 29); indeed, the opinion of the Court of Appeals below presumed that petitioner was "a potential defendant." App. 4.

warnings'' is an effort to camouflage the critical and uncontroverted fact that their representations constituted affirmative and material misstatements of the petitioner's rights. This characterization indicates that the Government denies it has any duty to be truthful in any statements which it may make, gratuitously or otherwise, to a grand jury witness. Such a position suggests that a grand jury witness should not rely upon any Government statements during the course of his grand jury appearance, a proposition which is unquestionably repugnant to the integrity of the grand jury system itself and in clear contravention of the principles of fundamental fairness.

Though the issues raised in *Mandujano* and in *Wong* embrace the question raised here, it is respectfully submitted that in the event that this Court were to hold that *Miranda*-like warnings need not be given to a putative defendant, the more fundamental issue raised here is still worthy of review.[7]

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[7]As evidence of this distinction, we need only point to the Government's own distinction between *Mandujano* and the decision in *United States* v. *Rangel*, 496 F.2d 1059 (5th Cir. 1974), (a decision upon which petitioner has, since his indictment, heavily relied). In its petition for certiorari in *Mandujano*, (Petition No. 74-754 at Ft.2 Page 5) the Government states:

> "In *Rangel*, however, the warning given the witness prior to testifying involved a double negative, which made it confusing and ambiguous, and contained an implicit threat that the witness would be held in contempt if he wrongly refused to answer. *Because these factual circumstances raise a question whether Rangel may not in fact have been compelled in some significant way to testify by the form of his warning or deterred by it from invoking his privilege*, Rangel's case does not squarely present the issue we are raising and we are not petitioning in his case." (emphasis added)

CONCLUSION

For the reasons set forth above, petitioner Charles G. Nickels prays that this Court grant a writ of certiorari to review the judgment of the trial court and of the Seventh Circuit in this case.

Respectfully submitted,

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